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No. 98-387

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSN., *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN SUPPORT OF PETITIONERS

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28 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST

Amici Curiae Valley Broadcasting Company (Valley) and Sierra Broadcasting Company (Sierra)[1] are broadcasters who are the licensees of television stations KVBC-TV, Las Vegas, Nevada, and KRNV-TV, Reno, Nevada, respectively, and were the plaintiffs in the case of *Valley Broadcasting Company v. United States,* 107 F.3d 1328

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[1] This brief was authored by counsel for *amici curiae* and no person or entity other than *amici curiae* made a monetary contribution to the preparation and submission of this brief. The brief is filed with consent of the parties, and copies of the consent letters have been filed with the Clerk.

(9th Cir. 1997), cert. denied, 118 Sup. Ct. 1050 (1998). In *Valley* the Ninth Circuit held that 18 U.S.C. Sec. 1304, as amended, which prohibits the broadcast of advertising for commercial casino gambling, violates the First Amendment. The *Valley* decision is in conflict with this case where the Fifth Circuit considered the same question and reached a contrary result, upholding the constitutionality of 18 U.S.C. Sec. 1304, as amended, and holding that the Government may prohibit the broadcast of advertising for commercial casino gambling. Since effectively *Valley* will be overturned if this Court upholds the Fifth Circuit in this case, Amici Curiae are interested parties.

SUMMARY OF ARGUMENT

A. The *Central Hudson* Test

This commercial speech case turns on the third part of the test stated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980), which is whether the government restriction on otherwise protected speech directly advances the governmental interest asserted. To justify its prohibition on the broadcast of advertising of only state licensed casino gambling in 18 U.S.C. 1304, as amended, the Government asserts two interests, reducing public participation in commercial lotteries and assisting states which do not permit casino gambling. However, as this Court found in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the statute cannot directly and materially advance its asserted interests because of the overall irrationality of the Government's regulatory scheme.

The statutory scheme cannot *reduce* public participation in commercial lotteries because it has been changed from a complete ban on broadcast advertising of all commercial lotteries to a ban which now applies only to state licensed casino gambling. As was pointed out in *Valley Broadcasting Company v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997), cert. denied, 118 Sup.Ct. 1050 (1998), the regulatory scheme now permits many other

types of lotteries to advertise over the airwaves, including state-run lotteries, fishing contests, not-for-profit lotteries, lotteries conducted as promotional activities by commercial organizations, and most significantly, gambling conducted by Indian casinos. As this Court found in *Rubin*, there is little chance that the regulatory scheme can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effect (514 U.S. at 489).

The statutory scheme also cannot directly advance the purpose of assisting states which do not permit casino gambling, because there is no restriction on the carriage by broadcasting stations in such states of advertising for Indian casino gambling, or governmental casino gambling, or non-profit casino gambling in states which permit such activities. Unlike the part of the statute involved in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), there is no restriction of Indian or other permitted casino advertising to broadcast stations licensed to states which permit such gambling. Under the provisions of 18 U.S.C. 1304, as amended, at issue in this case, once a state permits Indian or governmental or non-profit casino gambling within its borders, that gambling can be advertised on broadcasting stations *anywhere*. Thus, for example, under this statutory scheme, an Indian casino in Oklahoma is free to advertise its gambling on radio or television stations in Texas, a state which does not permit casino gambling. How can this advance the interest of the state which does not permit casino gambling? The answer is that it cannot.

As in *Rubin*, the statutory scheme in this case is irrational from the point of view of the governmental purposes supposedly being served. The 5th Circuit in this case attempts to distinguish *Rubin*, which the 9th Circuit in *Valley* cited in support of its decision, but the 5th Circuit never addresses the irrationality of the statutory scheme on which the 9th Circuit relied.

B. The Statutory Scheme on Its Face Violates the First Amendment.

The statutory scheme in this case requires broadcasters to discriminate among advertisers solely on the basis of the identity of the speaker of an otherwise acceptable commercial announcement, or the identity of the party on whose behalf the announcement is broadcast. As such, the statutory scheme on its face violates the First Amendment. It is not disputed that ads for state licensed casino gambling concern lawful activity and are not misleading. Since ads for Indian casino gambling and ads for not-for-profit, governmental and occasional and ancillary commercial casino gambling are now permitted to be broadcast over the air, it also cannot be disputed that the casino gambling ads which the state licensed casinos wish to broadcast are themselves acceptable for broadcast. That being the case, there is no basis under the First Amendment for the Government ban on such ads.

Over-the-air casino gambling advertising is either injurious to the public or it is not. It cannot be both injurious and not injurious at the same time. If a broadcaster is permitted to carry a commercial announcement saying "Play our slot machines" over the air on behalf of an Indian casino, it is presumably because that announcement is not injurious to the public. If that is the case, however, how can the same broadcaster's carriage of the same announcement, "Play our slot machines", on behalf of a state licensed casino ten minutes later be injurious to the public? The answer is that it cannot be. The statutory scheme of Sec. 1304, as amended, in which broadcasters are both permitted to and barred from carrying the same commercial announcement, is irrational. Whatever governmental purpose there may be behind this restriction cannot save it, because the selective nature of the restriction is self defeating.

By permitting the audience to receive broadcast announcements about Indian, not-for-profit, governmental

and occasional and ancillary commercial casino gambling, but not permtting the audience to receive broadcast announcements about state licensed casino gambling, the Government is depriving consumers of information concerning casino gambling choices lawfully available to them in the marketplace. That is precisely what the First Amendment prohibits the Government from doing in the area of commercial speech under *Virginia Pharmacy Bd. v. VA. Consumer Council*, 425 U.S. 748 (1976), and the many cases which have applied the principles set out there by this Court.

ARGUMENT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE CENTRAL HUDSON TEST IN THIS CASE WAS ERRONEOUS.

The question at issue in this case is whether 18 U.S.C. 1304, as amended by 18 U.S.C. 1307(a)(2) and the Indian Gaming Regulatory Act, 25 U.S.C. 2701, 2720, violates the First Amendment rights of broadcasters when applied by the Government to prohibit the television and radio broadcast of advertising for commercial casino gambling in states which permit such gambling.[2] The Petitioners are broadcasters licensed to operate stations in Louisiana, who seek to carry advertising for legal casinos in Louisiana and Mississippi. The Fifth Circuit twice held that the statutory scheme probiting the broadcast of advertisements for commercial casino gambling is a valid restriction on commercial speech and does not violate the

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[2] 18 U.S.C. Sec. 1304 is set forth in the Appendix to the Petition for writ of Certiorari in this case at page 61a, and 18 U.S.C. Sec. 1307 is set forth at pages 62a-63a. 25 U.S.C. Sec. 2720 states: "Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter." These three statutes are repeated virtually verbatim in 47 C.F.R. 73.1211, which is set forth in the Appendix to the Petition for writ of Certiorari at pages 63a-66a.

First Amendment.[3] Prior to the second 5th Circuit decision the 9th Circuit addressed the same question in *Valley Broadcasting Company v. United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 Sup.Ct. 1050 (1998), and ruled that the statutory scheme does violate the First Amendment. We submit that the 9th Circuit decision in *Valley* is correct and that this Court should reverse the 5th Circuit in this case.

It is undisputed that the advertisements at issue constitute commercial speech, and that accordingly, whether the Government's restriction on speech is permissible under the First Amendment depends upon the application to the case of the four part test set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).[4] The Government does not dispute that the casino gambling in question is legal and that the advertising which the broadcasters wish to carry is truthful, so the first part of the Central Hudson test is not at issue (*See GNOBA I*, 69 F.3d at 1299). The second part of the Central Hudson test is whether the asserted governmental interest is substantial. In this case, as in *Valley*, the Government asserted two interests, discouraging public participation in commercial lotteries and

[3] *Greater New Orleans Broadcasting Ass'n v. U.S.*, 149 F.3d 334 (5th Cir. 1998) (hereinafter "*GNOBA II*"); and an earlier decision, *Greater New Orleans Broadcasting Ass'n v. U.S.*, 69 F.3d 1296 (5th Cir. 1995), *vacated*, 117 S.Ct. 39, 136 L.E.2d 3 (1996), remanded in light of *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (hereinafter "*GNOBA I*").

[4] In *Central Hudson* the test was stated as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted Governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the Governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.* at 566.

assisting states that do not permit casino gambling (*See GNOBA I, 69 F.3d* at 1299). Since both the 5th Circuit below (*See GNOBA I, 69 F.3d* at 1299-1301) and the 9th Circuit in *Valley* (*See* 107 F.3d at 1331-1333), ruled that both governmental interests asserted are substantial, in this amicus curiae brief we shall assume, *arguendo*, that those interests are substantial.

The third part of the Central Hudson test is whether the regulation directly advances the governmental interest asserted. It is here that the 5th and 9th Circuits part company, the 5th Circuit ruling in this case that the regulation of speech directly advances the Governmental interests asserted, while the 9th Circuit ruled in *Valley* that the Government had failed to meet is burden of so proving. We submit that the 9th Circuit has the better of the argument.

A. The Regulatory Scheme Does Not Directly Advance the Governmental Interests Asserted.

On part 3 of the *Central Hudson* test the 9th Circuit took its guidance from this Court's decision in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), but the 5th Circuit[5] undertook to distinguish *Rubin* and thus to avoid following it. In *Rubin* this Court stated:

> "We conclude that § 205(e)(2) cannot directly and materially advance its asserted interest because the overall irrationality of the Government's regulatory scheme." 514 U.S. at 488.

The same is true with respect to lottery advertising over the air. 18 U.S.C. 1304, as amended, cannot directly and materially advance its asserted interests because of the overall irrationality of the Government's regulatory scheme.

[5] Chief Judge Politz dissented from both of the 5th Circuit decisions below on substantially the grounds which the 9th Circuit relied upon in *Valley*. References to "the 5th Circuit" in this amicus curiae brief are to the majority decision.

(1) *The regulatory scheme is irrational as regards the interest in reducing public participation in commercial lotteries.*

Over the years, since its adoption in 1934, Sec. 1304 has been amended repeatedly, with each amendment easing the restriction on the broadcast advertising of lotteries. The most recent amendments, in 1988, which led to the filing of the *Valley* case in 1992 and this case in 1994, added 18 U.S.C. Sec. 1307(a)(2) and Sec. 2720 of the Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2720, which authorize the broadcast advertising of lotteries by not-for profit organizations, governmental organizations, commercial organizations when promotional, occasional and ancillary to the primary business of the organization, and by Indian casinos. What has happened is that a statute which constituted a complete ban on all over-the-air commercial lottery advertising for over 50 years, from 1934 until 1988, has been changed to a regulatory scheme in which all forms of commercial lottery advertising, including Indian casino advertising, are now permitted, except for state-licensed casino advertising. The Government contends that this regulatory scheme directly and materially advances a governmental interest in reducing public participation in commercial lotteries, without ever explaining how its exemption of all other forms of commercial lotteries from the ban is not fundamentally contrary to that purpose.

The Government's position is simply irrational. As the 9th Circuit states:

> The government has consistently characterized its primary interest as "discouraging public participation in commercial lotteries, including casino gambling, and thereby minimizing the wide variety of social ills that have historically been associated with these forms of gambling." By the government's own description then, its interest is an extremely broad one—reducing public participation in *all commercial lotteries*. Taking the government's claim at face value, the statutory scheme here would appear to be flawed in the same manner as section 205(e)(2) was in *Coors Brewing*. That is, because section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries. To use the language of *Coors Brewing*, "[t]here is little chance that [the challenged regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Coors Brewing*, 115 S.Ct. at 1593. (*Valley*, 107 F.3d at 1335)

In short, the Government purports to directly and materially reduce public participation in commercial lotteries by permitting the broadcast advertising of such lotteries for the first time, which does not make sense.[6]

Moreover, as the 9th Circuit points out, even if the Government's interest is recast to be merely the reduction of public participation in casino gambling, the Government fares no better. The statutory scheme contains an exception even for casino gambling—casinos operated by Indian Tribes pursuant to the Indian Gaming Regulatory Act are exempt from the provisions of 18 U.S.C. 1304, *Valley*, 107 F.3d 1335-1336. Thus, the regulatory scheme

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[6] In *GNOBA I* (69 F.3d at 1301-1302), on the question whether permitting other forms of media to advertise casino gambling undercuts the governmental purposes of decreasing public demand for gambling, the 5th Circuit quotes this Court's statement in *Edge*:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. (113 S.Ct. at 2707)

It also stands to reason, if the federal regulation increases advertising, as the 1988 amendments do most certainly, that the policy of decreasing demand for gambling is not advanced.

is irrational whether the governmental interest being served is to reduce public participation in commercial lotteries or to reduce public participation in casino gambling.

(2) *The regulatory scheme is irrational as regards the interest in assisting states which prohibit casino gambling.*

The irrationality of the regulatory scheme with regard to the Government's second governmental interest can be shown by contrasting 18 U.S.C. Sec. 1307(a)(2), the statutory amendment to Sec. 1304 at issue in this case, with 18 U.S.C. Sec. 1307(a)(1), its companion provision which was before this Court in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). Sec. 1307(a)(1), which was at issue in *Edge*, on its face applies to an ad for a lottery "conducted by a state" and "broadcast by a radio or television station licensed to a location in that state or a state which conducts such a lottery" (Sec. 1307(a)(1)(B). On the other hand, Sec. 1307(a)(2), the section of the statute at issue in this case, on its face applies to an ad for a lottery other than a lottery conducted by a state (e.g., a casino game), "that is authorized or not otherwise prohibited by the State in which it is conducted." (Sec. 1307(a)(2)). In Sec. 1307(a)(2), however, *there is no limitation as to the location of broadcasting stations which can carry the ad.* There are additional restrictions addressed to the nature of the entity which may conduct the lottery (casino game), i.e., not-for-profit or governmental organizations, etc., but there is no restriction on the broadcast of such an ad by any radio or television station anywhere.

Thus, for example, under Sec. 1307(a)(2)(A) an ad for the slot machines at Las Vegas' McCarran International Airport, which are conducted by a governmental organization, Clark County, can be carried by radio and television stations in Nevada, which permits casino gambling or by stations in Utah, which does not permit casino

gambling. How does this "assist states which do not permit casino gambling"?

The same is true of ads for Indian casinos. Under the Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2701, et seq., a Tribe is required to obtain Department of the Interior approval of a compact with the state in which it is located before it can operate a casino,[7] but once that is done, under 25 U.S.C. Sec. 2720, the Indian casino is wholly exempt form 18 U.S.C. Sec. 1304 and is free to broadcast ads for its casino games anywhere, in states which permit casinos or in states which prohibit them. Thus, for example, Indian casinos in Louisiana, Oklahoma and New Mexico are free to advertise their gambling on radio and television stations in Texas, although, as the 5th Circuit states (*See GNOBA I* 69 F.3d at 1301), Texas does not permit casino gambling. In *Rubin* this Court said:

> "The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars." (514 U.S. at 488)

To paraphrase *Rubin*, permitting television and radio stations in states which do not permit casino gambling to carry ads for Indian casinos makes no rational sense if the Government's true aim is to assist states which do not permit casino gambling. As the Ninth Circuit states with reference to the exemption for ads for Indian casinos:

> "Such exemption permits Indian Tribes to advertise both in states which allow casino advertising and in those which forbid it. This would appear to undermine the Government's purported interest in protect-

[7] The Department of the Interior's official updated Tribal-State Compact List is available online at http://www.doi.gov/bia/foia/compact/htm. It currently shows 157 Tribes in 24 States with 196 Compacts.

ing non-casino states from the reach of casino advertisements on the airwaves." (*Valley*, 107 F.3d at 1336)

The 9th Circuit's holding that the Government has failed to meet its burden of showing that the restriction on speech in this case directly and materially advances its interests is on strong ground with respect to both interests asserted. As this Court said in *Edenfield v. Fane*, 507 U.S. 761, 769 (1993): "The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." Rather, the Government must demonstrate that "its restrictions will in fact allieviate [the asserted harms] to a material degree.' *Id.*

The 5th Circuit, in its first decision in this case below simply distingished this Court's ruling in *Rubin*, that an irrational regulatory scheme could not directly and materialy advance its governmental interest, on the ground that that situation does not exist here (GNOBA I at 1301). The court does so, however, not by examining the statutory provisions in question from the point of view of the governmental interests alleged, but by relying on broad generalities:

> Congress has singled out particular forms of gaming for which broadcast advertising is permitted, and in so doing made legitimate, quintessentially legislative choices that the social costs of these activities were less than those of casino gambling, or the social benefits, e.g. of staterun lotteries, Indian and charitable gambling, were greater. (Footnote omitted.) *GNOBA I*, 69 F.3d at 1301.

In its second decision the 5th Circuit reaffirmed this holding, stating:

> We remain persuaded, for the reasons stated in our previous opinion, that *Rubin* does not compel the striking down of § 1304. The government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that

> the social impact of activities such as staterun lotteries, Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope. That the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it (Citations omitted). There is also no doubt that the prohibition on broadcast advertising reinforces the policies of states, such as Texas, which do not permit casino gambling. *GNOBA II*, 149 F.3d at 338.

The 5th Circuit simply refuses to see any conflict between a governmental interest in reducing public participation in commercial lotteries and a statutory scheme which for the first time permits the broadcast advertising of many commercial lotteries, or any conflict between a governmental interest in assisting states which do not permit casino gambling and a statutory scheme which permits the broadcast advertising of Indian casino gambling in those states.[8]

As this Court found in *Rubin*, the problem with the Government's restriction on commercial speech in this case is that the regulatory scheme does not make sense from the point of view of the governmental interests purportedly being served. That being so, the restriction cannot directly and materially advance those interests, so it must fail the third part of the *Central Hudson* test. The failure of the 5th Circuit to so find was error.

Having found that 18 U.S.C. 1304, as amended, fails the third part of *Central Hudson*, the 9th Circuit did not reach the fourth part, and Amici will do the same here.

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[8] It should also be noted that this Court stated in *Rubin*: "Nor do we think that respondent's litigating positions can be used against it as proof that the Government's regulation is necessary." 514 U.S. at 490.

II. THE STATUTORY SCHEME OF DISCRIMINATION BASED SOLELY ON THE IDENTITY OF THE SPEAKER OF AN OTHERWISE ACCEPTABLE COMMERCIAL ANNOUNCEMENT, OR THE IDENTITY OF THE PARTY ON WHOSE BEHALF THE ANNOUNCEMENT IS BROADCAST, ON ITS FACE VIOLATES THE FIRST AMENDMENT.

There is a fundamental problem with 18 U.S.C. 1304, as amended, under the First Amendment, entirely apart from any questions regarding the governmental purposes behind the statute. The problem is that the statutory scheme discriminates solely on the basis of the identity of the speaker of an otherwise acceptable commercial announcement, or the identity of the party of whose behalf the announcement is broadcast. With respect, we submit that even though this is "merely" commercial speech, such discrimination on its face violates the First Amendment.

18 U.S.C. 1304 itself, standing alone, does not present any problem in this regard. While it is Draconian in its criminalizing of broadcast speech, Sec. 1304 treats everyone who falls within its ambit equally: "Whoever broadcasts * * * or * * * knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme" shall be fined or imprisoned, or both. The statute is straightforward: it punishes anyone who broadcasts an advertisement concerning a lottery. It targets the content of the advertisement, the speech. The effect of Sec. 1304 is to ban certain speech, namely advertisements concerning lotteries, from the airwaves.

Sec. 1307(a)(2), however, does not treat everyone who falls within its ambit equally. That section of the statute creates an exception to the ban of Sec 1304 for an advertisement concerning a lottery, other than a state lottery, that is authorized or not otherwise prohibited by the State in which it is conducted, and which is—

> "(A) conducted by a not-for-profit organization or a governmental organization; or

> (B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that orgainzation."

Sec. 1307(a)(2) creates an exception to the restriction on the speech of broadcasters stated in Sec. 1304 not on the basis of what is spoken in the announcement, but on the basis of the type of organization which conducts the lottery, that is, the exception is based on the identity of the party who speaks in the announcement or on whose behalf the announcement is spoken.

Sec. 2720 of the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq., is like Sec. 1307(a)(2) in this regard. It creates an exception to the restriction on the speech of broadcasters contained in Sec. 1304 for any gaming conducted by an Indian tribe under the Act. Again, the exception is based on the identity of the party conducting the gaming, in this case an Indian tribe.

Sec. 1307(a)(2) by its terms discriminates against a class of broadcast advertisements, namely, those concerning lotteries that are authorized or not otherwise prohibited by the state in which they are conducted and which *do not* come within either section (A) or (B). In reality, since there is also an exception for Indian casinos, the only lottery advertisements which come within the class discriminated against, that is, the only lottery advertisements that are not excepted from the ban of Sec. 1304, are ads for state licensed and regulated casinos and casino games.

As indicated above, Sec. 1304 standing alone constitutes a ban on lottery advertising over the air. It is important to note what effect the exceptions set forth in Sec. 1307(b)(2) and the Indian Gaming Regulatory Act have on the ban. The effect is simple: advertisements concerning lotteries are no longer banned from the airwaves, they are now acceptable for broadcast. Broadcasters are now permitted to carry ads concerning lotteries which are con-

ducted by the organizations named in subsections (A) and (B) of Sec. 1307 and Sec. 2720 of the Indian Gaming Regulatory Act.

This raises a practical question regarding the statutory scheme. What basis is left for barring ads for state licensed casinos from the air waves? It is not disputed that these ads concern lawful activity and are not misleading. And now it cannot be disputed that the ads themselves are acceptable for broadcast. What basis is left for a governmental restriction on speech here? What we are left with is a statutory scheme which discriminates against certain ads solely on the basis of the identity of the speaker or the entity on whose behalf the ads are broadcast. Is such discrimination permissible under the First Amendment? We submit that it is not and cannot be.

This case presents the question under the First Amendment whether the Congress can make a law authorizing broadcasters to carry commercial announcements for one group of advertisers and prohibiting them from carrying the same commercial announcements for another group of advertisers, even though it is conceded that the ads for the second group are truthful and about lawful activities. It appears this question is a matter of first impression in the Court.

If the first part of the *Central Hudson* test is met, as it concededly is here, the ads for state licensed casinos are "protected by the First Amendment", *Central Hudson*, 447 U.S. at 566. Assuming, arguendo, that because it is merely commercial speech the Government may have a right to restrict this speech to some extent, the fact remains that it is still speech that is being broadcast over the air to the public, it is about lawful activity, and it is not misleading. The fact that this speech is protected by the First Amendment must mean, at the least, that the Government must have a rational basis for whatever restriction it imposes, and that such restriction must somehow be related to the public good, whether it is called the

public interest, or protecting the public from injury, or whatever.

The problem with the statutory scheme under Sec. 1304, as amended, is that over-the-air casino gambling advertising is either injurious to the public or it is not. It cannot be both injurious and not injurious at the same time. If a broadcaster is permitted to carry a commercial announcement saying "Play our slot machines" over the air on behalf of an Indian casino, it is presumably because that announcement is not injurious to the public. If that is the case, however, how can the same broadcaster's carriage of the same announcement, "Play our slot machines", on behalf of a state licensed casino ten minutes later be injurious to the public? The answer, we submit, is that it cannot be. The statutory scheme of Sec. 1304, as amended, in which broadcasters are both permitted to and barred from carrying the same commercial announcement, is irrational. Whatever governmental purpose there may be behind this restriction cannot save it, because the selective nature of the restriction is self defeating.

This Court has recognized that it is not only the rights of the speaker, in this case the broadcaster or the state licensed casino operator, that are at issue in commercial speech situations, but also the rights of the audience. What is the effect on the audience of this governmental restriction on speech? Plainly, by permitting the audience to receive broadcast announcements about Indian, not-for-profit, governmental and occasional and ancillary commercial casino gambling, but not permitting the audience to receive broadcast announcements about state licensed casino gambling, the Government is depriving consumers of information concerning casino gambling choices lawfully available to them in the marketplace.

As was shown in the first part of this brief, the statutory scheme here is irrational from the point of view of the governmental purposes allegedly being served by it. Regardless of what the Governmental purpose may be, however, the effect of the scheme is clear: it provides

consumers with information about casino gambling conducted by parties who are favored by the Government and deprives them of information about casino gambling conducted by parties who are disfavored by the Government. The Government here is manipulating the casino gambling marketplace indirectly by depriving the consumer of information about choices lawfully available in the market.[9]

In *Virginia Pharmacy Bd. v. VA. Consumer Council*, 425 U.S. 748, 756 (1976), which involved a ban on price advertising of prescription drugs by pharmacists, this Court said:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. * * * If there is a right to advertise, there is a reciprocal right to receive the advertising (footnote and citations omitted.)

The Court went on to state:

> Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. * * * As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. * * * Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial", may be of general public interest, * * * Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what

[9] Under the First Amendment could the Congress permit broadcasters to carry ads for General Motors and Ford cars, for example, and forbid them to carry ads for Toyota, Volkswagen and other foreign based auto manufacturers?

> product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. (Footnotes and citations omitted, 425 U.S. at 762-765).

The Court in *Virginia Pharmacy Board* then responded to the State's arguments that consumers would make irresponsible choices if they were able to choose between higher priced but higher quality pharmaceuticals with high quality prescription monitoring services on the one hand, and cheaper but lower quality pharmaceuticals without such services on the other:

> [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
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> There is, of course, an alternative to this highly paternalistic approach. That alternative is, to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. * * * It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways (Citation omitted). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. (425 U.S. at 769-770).

While the Court has split on several aspects of commercial speech law in the years since *Virginia Pharmacy Bd*, these notions have remained at the heart of the Court's First Amendment jurisprudence in this area. Illustrative of this is the fact that in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996), in their opinions both Justice Stevens (116 S. Ct. at 1505) and Justice Thomas (116 S. Ct. at 1516) quoted extensively from *Virginia Pharmacy Bd.* As Justice Thomas said in his concurring opinion (116 S. Ct. at 1517):

> In case after case following *Virginia Pharmacy Bd.*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; * * * [10] and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly. fn. 2.

Footnote 2 cites to the Court's decisions in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1997); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364-365, 368-369, 374-375, 376-377 (1997); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1979), *Central Hudson*, 447 U.S. at 561-562; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985), *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-422, n.17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767, 770 (1993); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084, 2088-2089 (19994); *Rubin*, 514 U.S. at 481 (1995); and numerous concurring and dissenting opinions in these and other cases.

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[10] The omitted clause is "the near impossibility of severing 'commercial' speech from speech necessary to democratic decision-making", a question not at issue here.

With regard to discrimination, the Court in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) struck down a regulation which discriminated between newsracks distributing commercial handbills and those which distributed newspapers, and stated: "[J]ust last term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas,'" citing *Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The discrimination at issue in this case, between lawful commercial speakers of the same message solely on the basis of the identity of the speaker, is also suspect under the First Amendment and should also be struck down by the Court.

In its first decision below the Fifth Circuit stated, in defense of its ruling on the third part of the Central Hudson test, "Additionally, Congress is permitted more intrusive regulation of the broadcast media than other forms of media," citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 2456 (1994), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-9 (1969) (GNOBA I, 69 F.3d at 1302, fn. 7). The scarcity rationale of *Red Lion*, however, has no bearing on the commercial free speech question at issue in this case, and does not in any way justify the discrimination among speakers of the same mesage which is imposed on broadcasters here. The Court in *Turner* stated:

> [T]he inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. *Red Lion*, 395 U.S., at 390. As we said in *Red Lion*: "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridge-

> able First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, 395 U.S. at 388. (512 U.S. at 638)

Whatever the viability of the scarcity rationale may be today,[11] it has no bearing on the issues in this case. Among the "limited content restraints" placed on broadcasters has always been 18 U.S.C. 1304, which forbade the broadcast of all lottery advertising, as discussed above. For over 50 years, from 1934 until 1988, although newspaper advertising of casino gambling was common in jurisdictions where such gambling was legal, no broadcaster ever challenged the ban on broadcast advertising of casino gambling on the basis of "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." It was not until Sec. 1307(a)(2) and Sec. 2720 of the Indian Gaming Regulatory Act, which discriminated among lawful advertisers who wished to speak the same message, became the law that these amendments were challenged. In this regard it should be noted that in *Turner* the Court also stated:

> [T]he argument exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute from engaging in "censorship" or from promulgating any regulation "which shall interfere with the [broadcasters'] right of free speech." 47 U.S.C. § 326. 512 U.S. at 650.

What we contend here is that the Government's requirement that broadcasters discriminate between lawful advertisers seeking to air the same message solely on the basis of the identity of the advertisers constitutes censorship and interference with the broadcasters' right of free speech under the First Amendment.

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[11] The Court in Turner noted that "courts and commentators have criticized the scarcity rationale since its inception". 512 U.S. at 638.

As indicated at the start of this discussion, Amici submit that the discriminatory nature of the statutory scheme at issue here violates the First Amendment on its face. This may raise a question as to how our view of this case comports with the Central Hudson test. It is not our purpose to argue, on the basis of this one case, that the Central Hudson test is flawed, although we recognize that some members of the Court believe it is, or that strict scrutiny should necessarily apply to all commercial speech cases, although we recognize that that view is also held on the Court, and that other amici in this case so contend. In our view this case turns on the particular statutory scheme employed and on the type of restriction on commercial speech which results, matters presently not specifically addressed in the Central Hudson test.

The First Amendment analysis must start, we agree, with the first part of the Central Hudson test, an inquiry into the type of speech involved, that is, whether the activity is lawful and the speech not misleading. Once that is determined, however, we suggest that before turning to the governmental purpose behind the restriction on speech, the Court might examine, perhaps in a part 1B, the restriction on speech itself, to determine whether it is a type of restriction which is or is not acceptable under the First Amendment. Is it, for example, a time, place or manner restriction which is content neutral, or is it such a restriction which is not content neutral, and thus presumably contrary to the First Amendment, regardless of the governmental interest being served. Or it is, as in this case, a restriction on commercial speech which discriminates solely on the basis of the identity of the speaker, which we submit is also contrary to the First Amendment, without regard to whatever governmental interest there may be behind the restriction. Or is it a restriction which protects consumers from misleading, deceptive or aggressive sales practices, or conversely, one which is unrelated to the preservation of a fair bargaining process? Should there be, as Justice Stevens proposed in *44 Liquormart* (116 S. Ct. at 1507) a different degree of scrutiny de-

pending upon which of these types of restriction is involved? Although the commercial speech cases which have come before the Court tend to group themselves by the type of restriction on speech which is involved, the *Central Hudson* test does not take cognizance of that factor in measuring them under the First Amendment. Instead of looking for a single talisman for all commercial speech cases, the Court might consider merely adding a part 1B to the *Central Hudson* test, so as to focus more on the type of governmental restriction on commercial speech which is involved in each case, and less on the governmental purpose behind the restriction.

CONCLUSION

Because of the overall irrationality of 18 U.S.C. 1304, as amended, the statutory scheme at issue here, it cannot directly and materially advance the Government's interests in reducing public participation in commercial lotteries and assisting states which do not permit casino gambling. That being the case, the Government's restriction on the commercial speech of broadcasters fails the third part of the *Central Hudson* test and, accordingly, violates the First Amendment. It is not necessary for the Court to reach part three of *Central Hudson,* however, because the statutory scheme of discrimination based solely on the identity of the speaker of an otherwise acceptable commercial announcement, or the identity of the party on whose behalf the announcement is broadcast, on its face violates the First Amendment. In either event, the statutory scheme at issue in this case violates the First Amendment rights of broadcasters.

Respectfully submitted,

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